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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DAVID C. NICHOLLS, Plaintiff and Appellant, v. HERMOSA BEACH POLICE DEPARTMENT et al., Defendants and Respondents.	B207730 (Los Angeles County Super. Ct. No. YC054109)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael P. Vicencia, Judge. Dismissed.

James M. Tillipman for Plaintiff and Appellant.

Lynberg & Watkins, S. Frank Harrell and Scott D. Danforth for Defendants and Respondents.

Plaintiff and appellant David C. Nicholls attempts to appeal the order dismissing his civil rights action against defendants and respondents Hermosa Beach Police Department and the City of Hermosa Beach. The appellate record includes notices of appeal filed May 1, or May 6, 2008,[1] which refer to an earlier order denying his ex parte application to continue the trial date and reopen discovery. The appeal must be dismissed because the notices of appeal referenced a nonappealable order. The premature notice of appeal doctrine does not apply because both notices of appeal were filed before the trial court announced its intended ruling on the motion to dismiss. (Cal. Rules of Court, rule 2(d).)

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

According to Nicholls's second amended complaint, he is a quadriplegic and was confined to a wheelchair at the time of the underlying incident, which occurred on the morning of August 21, 2005. Nicholls was walking his dog in Hermosa Beach, when a police patrol car pulled over beside him. The police officer exited the car and ordered Nicholls to stop. He was unable to do so, however, because the dog "continued pulling the wheelchair." The officer became "enraged" and attacked him, causing Nicholls to suffer physical and emotional pain and suffering and "the expenditure of money for treatment." Defendants denied the allegations.

On April 7, 2008, Nicholls filed an ex parte application to continue the May 13, 2008 trial date and reopen discovery, seeking a continuance of 90 to 120 days.[2]

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[1] The record contains two nearly identical notices of appeal by Nicholls, both of which purport to appeal the same April 21, 2008 order. On appeal, Nicholls identifies the relevant notice of appeal as the one filed on May 1, 2008.

[2] The application was filed by Nicholls in propria persona. A prior application to the same effect had been filed on March 26, 2008, by Attorney James Tillipman (counsel on appeal). However, Tillipman was never substituted in as counsel—his application for

Defendants' motion to compel the taking of Nicholls's deposition was pending at the time. The ex parte matter was heard on April 21, 2008, at which time the trial court denied both aspects of the application, finding Nicholls's need for a continuance and additional discovery was the result of his own lack of diligence. The court ordered that Nicholls's deposition be conducted by videoconferencing or other electronic means no later than May 2, 2008, at 4:00 p.m. Notice of the ruling was filed on April 22, 2008; Nicholls was served with notice of the ruling the day before by mail.

Defendants' motion to dismiss the action as a sanction for Nicholls's failure to comply with discovery orders was heard on April 28, 2008. The trial court denied the request for terminating sanctions, finding Nicholls was in violation, but "a sanction of termination is too extreme at this point." The court granted defendants' alternative remedies, imposing sanctions of $990 in favor of the City of Hermosa Beach and ordering that Nicholls be precluded from presenting at trial any documents other than those previously produced to defendants. Notice of the ruling was filed on May 1, 2008 and served by mail on Nicholls the day before.

Nicholls's notice of appeal was filed on May 1, 2008, having been served by mail on April 30, 2008. The notice stated that Nicholls appealed from the "order or judgment" entered on April 21, 2008, which Nicholls indicated had been rendered under Code of Civil Procedure section 904.1, subdivisions (a)(3) through (13).[3]

Nicholls did not appear for his deposition by videoconference, which had been noticed for May 2, 2008, at 9:00 a.m. Defendants filed an application to dismiss the action based on Nicholls's new discovery violation as well as the previous ones. The

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substitution was withdrawn when the trial court denied defendant's request for a continuance.

[3] In fact, none of those provisions applies to the discovery order entered on April 21, 2008. As noted *ante*, the second notice of appeal, filed May 6, 2008, purports to appeal from the same judgment or order and appears identical save for proof of service, which was signed by a third person (Nicholls himself signed the proof of service for the prior notice).

application was heard on the trial date, May 13, 2008. After exhaustive argument by the parties, including Nicholls who was still representing himself, the trial court found Nicholls committed numerous willful violations of the discovery orders "with the intention of delaying the action and denying the defendants their right to discover what this case is about before trial." Finding alternative remedies of monetary and evidentiary sanctions ineffective, the court ordered the matter dismissed. The judgment of dismissal was entered on May 30, 2008. Notice of entry of judgment was filed on June 6, 2008, and served by mail on Nicholls that same day. Nicholls filed a motion to reconsider the order of dismissal, which was denied on June 20, 2008.

DISCUSSION

According to his opening brief, Nicholls purports to appeal from the judgment of dismissal based on his discovery violations and devotes his argument entirely to reasons why that ruling (and the denial of his motion to reconsider it) was improper. As our summary of the relevant procedural history has shown, however, defendant's notice of appeal did not identify that judgment or the order on which it was based.[4] Rather, it referred to a discovery order issued prior to the hearing at which terminating sanctions were imposed. Accordingly, as defendants contend,[5] "the threshold issue is one of appealability." (*First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 959 (*First American Title Co.*), fn. omitted.)

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[4] As defendants point out, Nicholls' opening brief fails to contain a statement "that the judgment appealed from is final, or [an explanation] why the order appealed from is appealable," as required by rule 8.204(a)(2)(B) of the California Rules of Court.

[5] The first argument in defendants' appellate briefing is that the appeal must be dismissed because plaintiff's notice of appeal is improper and inadequate for failing to identify the terminating sanctions order and judgment. As such, Nicholls had notice of this dispositive issue of appealability. (Cf. *First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 959, fn. 3.)

Under the California Rules of Court, the "'notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed. . . .' [Citations.]" (*First American Title Co., supra,* 108 Cal.App.4th at p. 959, citing former Cal. Rules of Court, rule 1(a)(2) [now rule 8.100(a)(2)].) As we have explained, "the California Supreme Court stated, 'Under this rule, and prior to its adoption, it is and has been the law of this state that notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced.' [Citations.]" (*D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361.)

Nevertheless, "[d]espite the rule favoring liberal interpretation of notices of appeal, a notice of appeal will not be considered adequate if it completely omits any reference to the judgment being appealed." (*Shiver, McGrane & Martin v. Littell* (1990) 217 Cal.App.3d 1041, 1045.) "'It is elementary that an appeal from a portion of a judgment brings up for review only that portion designated in the notice of appeal. . . .'" (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 625 (*Unilogic*), quoting *Glassco v. El Sereno Country Club, Inc.* (1932) 217 Cal. 90, 91-92 (*Glassco*).) Moreover, it is well established that absent an appealable order, an appeal must be dismissed. (E.g., *First American Title Co., supra,* 108 Cal.App.4th at p. 961.) "Generally, no order or judgment in a civil action is appealable unless it is embraced within the list of appealable orders provided by statute (Code Civ. Proc., § [904.1])."[6] (*Lund v. Superior Court* (1964) 61 Cal.2d 698, 709 (*Lund*).)

Here, the only order identified by the notice of appeal was the one entered on April 21, 2008—the denial of Nicholls's ex parte application to continue the trial and reopen discovery. This order is a nonappealable interlocutory order, pursuant to Code of Civil Procedure sections 904.1 and 904.2. (See, e.g., *Datig v. Dove Books, Inc.* (1999) 73 Cal.App.4th 964, 984 [an order denying a motion to compel a deposition is not an appealable order].) The denial of Nicholls's ex parte application regarding discovery can

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6 The *Lund* court cited the former provision, Code of Civil Procedure section 963.

in no way "be considered to be a final judgment on a collateral matter growing out of the action [citation]." (See *Lund, supra,* 61 Cal.2d at p. 709.) Rather, it is "an order made for the purposes of furthering discovery proceedings, or granting sanctions for refusal to make discovery, [which] is not appealable [citations]." (*Ibid.*; see also *Cohen v. Herbert* (1960) 186 Cal.App.2d 488, 490 [orders denying a continuance are not appealable].)

As explained in *Shiver, McGrane & Martin v. Littell, supra,* 217 Cal.App.3d at page 1046, "a notice of appeal which specifies a portion of a judgment may not be stretched beyond its logical limits to include other parts of the judgment." The nonappealable order denying Nicholls's discovery requests cannot logically encompass the subsequent order of terminating sanctions entered against him. Accordingly, this appeal bears no material resemblance to decisions such as ours in *D'Avola v. Anderson, supra,* 47 Cal.App.4th at page 362, footnote 4, in which we found the misidentification of the superior court case number did not result in a deprivation of appellate jurisdiction where the notice of appeal correctly identified the order sought to be reviewed. Because Nicholls's notice of appeal "completely failed to mention the judgment or order challenged in the appellate court," it must be dismissed pursuant to the rule in the *Glassco* and *Unilogic* line of cases. (See *D'Avola v. Anderson, supra,* at p. 362, fn. 4.)

Nor can Nicholls avoid dismissal under the premature notice of appeal rule. Under rule 8.104(e) of the California Rules of Court, "[a] notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment" and "[t]he reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment." Just as in *First American Title Co., supra,* 108 Cal.App.4th 956, the plaintiff's notice of appeal was filed neither after judgment was rendered nor after the trial court announced its intended ruling. Rather, because the notice of appeal was filed before the relevant hearing, it cannot be deemed a premature notice of appeal from the terminating sanctions order. (See *id.* at pp. 960-961.) It follows that the purported appeal must be dismissed. (*Id.* at p. 961.)

DISPOSITION

Nicholls's appeal is dismissed. Respondents shall recover costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.